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*405 **LIFTING** THE **PSLRA** "**AUTOMATIC STAY**" OF **DISCOVERY**

Brian Philip Murray [FNa1]

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I. INTRODUCTION

In 1995, the Private Securities Litigation Reform Act (**PSLRA**) [FN1] added identical provisions to the Securities Act of 1933 ("Securities Act") and Securities Exchange Act of 1934 ("Exchange Act") **staying discovery** during the pendency of a motion to dismiss. [FN2] These provisions make securities claims the only cases litigated in federal court in which **discovery** is **stayed** in these circumstances. [FN3] Although the **discovery stay** operates **automatically**, courts have discretion to **lift** the **stay**, something they are doing with increased frequency. [FN4] This article will discuss the circumstances under which courts grant relief to plaintiffs seeking to **lift** the **discovery stay**, and the policy reasons for and against such relief.

II. THE PRIVATE SECURITIES LITIGATION REFORM ACT AND MOTIONS TO **STAY DISCOVERY** PRIOR TO 1995

In the federal courts, **discovery** proceeds despite a motion to dismiss in every sort of case except those alleging claims under the Securities Act or Exchange Act. [FN5] In 1995, after intense lobbying by accountants, underwriters, and high-tech companies, both the Securities Act and Exchange Act were amended to state, "In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." [FN6] The rationale behind these amendments was two-fold: to save defendants the cost and burden of discovery in a case that might be dismissed and to prevent plaintiffs from filing a case without having sufficient information to meet the heightened pleading requirements ***406** of the PSLRA and then using discovery to acquire sufficient information to avoid dismissal. [FN7] The House and Senate managers of the PSLRA Congress found that approximately 80% of the cost of litigating securities class actions was associated with discovery and such costs should be incurred by a litigant only after the court ruled on the sufficiency of the complaint. [FN8] They further found that the "threat that the time of key employees will be spent responding to discovery requests and after forces coercive settlements." [FN9]

Prior to 1995, a defendant in a federal securities case would have to participate in discovery during the pendency of a motion to dismiss. In order to avoid discovery, a defendant would have to move for a protective order under Federal Rule of Civil Procedure Rule 26(c) and request a stay of discovery. [FN10] To succeed, defendants would have to show good cause that they would suffer harm if such stay was not granted. [FN11]

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Usually, defendants would attempt to show their motion to dismiss should be granted and discovery would therefore be premature or burdensome. [FN12] When a defendant asserted that dismissal was likely, motions for stays required courts to make "preliminary finding[s] of the likelihood of success on the motion to dismiss." [FN13] Since every defendant who files a motion to dismiss contends that it will prevail, this specious logic could result in a **stay** in every case in which **stay** motions were filed. [FN14] If a court did not rule on the **stay** motion until it decided the motion to dismiss, a defendant could grant itself a de facto **stay** by delaying production until the court ruled on the **stay** motion.

When courts did rule on the motion to **stay discovery**, Rule 26 places the burden of persuasion on the party seeking the protective order. [FN15] To meet this burden, the party seeking the protective order would attempt to show good cause by demonstrating that the **discovery** would produce an "undue burden and expense," [FN16] and courts would consider the relative ***407** hardship to the non-moving party. [FN17] A showing that **discovery** might involve some inconvenience and expense was not sufficient to establish the good cause necessary for the **stay**. [FN18] Most often, courts denied the motions to **stay discovery**. [FN19] With the passage of the **PSLRA**, all this became unnecessary.

III. **LIFTING** THE STATUTORY **STAY**

Absent a showing of "undue prejudice," courts abide by the new statutory scheme of **staying discovery** during the pendency of a motion to dismiss in a securities case. [FN20] The concept of "undue prejudice" is open to interpretation. The only example cited in the **PSLRA's** legislative history is "the terminal illness of an important witness," which might "necessitate the deposition of the witness prior to the ruling on the motion to dismiss." [FN21] Courts have taken a flexible definition of "undue prejudice." One court in New York has defined it to mean improper or unfair treatment rising to a level somewhat less than irreparable harm. [FN22] Although the same definition is used in the Ninth Circuit as by the Southern District of New York, the courts differ in their interpretations. One judge in the Southern District of New York has held "if the absence of discovery would essentially protect defendants from liability, undue prejudice would result;" [FN23] a sentiment ***408** supported by another judge in that district. [FN24] In contrast, the Ninth Circuit has held that "failure to muster facts sufficient to meet the [Exchange] Act's pleading requirements cannot constitute the requisite 'undue prejudice' to the plaintiff justifying a lift of the discovery stay." [FN25]

A. Allowing Third-Party Discovery

Even when all defendants move to dismiss, courts have discretion to lift the discovery stay. [FN26] Courts have shown a willingness to lift the discovery stay if it is necessary for the plaintiff to subpoena willing witnesses who are barred from cooperating due to confidentiality agreements. [FN27] In In re Flir Systems, Inc. Securities Litigation, [FN28] the court lifted the discovery stay to allow plaintiffs to subpoena a willing third-party witness who was prohibited from speaking to them absent the subpoena due to the terms of an employment contract's confidentiality provision. [FN29] The court held that it was significant that the discovery was directed against a third-party rather than a defendant and noted that the discovery stay was intended to protect defendants from unnecessary discovery costs, but that concern was not implicated when the deposition was not of a defendant or a current employee of a defendant. [FN30] The court also noted that the deposition was not part of a fishing expedition since the deponent had filed a civil complaint in state court corroborating plaintiff's allegations. [FN31] The court reasoned,

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> The PSLRA is a shield intended to protect security-fraud defendants from costly discovery requirements, not to be a sword with which defendants can destroy the plaintiffs' ability to obtain information from third parties who are otherwise willing to disclose it. Allowing defendants to seek dismissal of plaintiffs' ***409** complaint without affording plaintiffs the opportunity to discover Palmquist's information regarding defendants' fraud--information which is known to exist and which has been withheld only as a result of defendants' efforts to silence Palmquist--would result in "undue prejudice" to plaintiffs. [FN32]

In Anderson v. First Securities Corp., [FN33] a situation similar to Flir arose. [FN34] The plaintiffs located a willing third-party witness who had obtained details about the alleged fraud during the third-party's due diligence for an aborted merger with the defendant. [FN35] The third-party was prevented by a confidentiality agreement from sharing the information with the plaintiffs but was otherwise willing to do so. [FN36] The defendants opposed lifting the stay, arguing that the plaintiffs would not suffer undue prejudice if the stay was not lifted and that the plaintiffs failed to identify the "particularized discovery" they sought. [FN37] The court rejected defendants' arguments, holding that the plaintiffs would suffer undue prejudice if they were not permitted to conduct the limited discovery and that since plaintiffs had already articulated the basis of liability, the discovery would not be a fishing expedition. [FN38] To ensure that a fishing expedition did not result from the discovery, the court limited the discovery to information relating to issues or claims already alleged in the complaint. [FN39] The same result was reached in Dartley v. Ergobilt, [FN40] in which the court allowed one deposition of a willing third-party witness who resided beyond the subpoena power of the court, holding that the deposition would not frustrate the intent of the stay provisions. [FN41] The court held that the situation fit the exception in the PSLRA for particularized discovery necessary to preserve evidence. [FN42]

Allowing willing third-party witnesses to give depositions is not the only situation in which courts are willing to lift the statutory discovery stay. [FN43] In Global Intellicom, Inc. v. Thomas Kernaghan & Company, [FN44] a ***410** group of short-sellers was sued in federal court by a company the short-sellers were suing in state court. [FN45] The short-sellers were suing in state court to force conversion of preferred stock and, in effect, to take over the company; the company was suing the short-sellers in federal court for violating federal securities laws when the short-sellers drove the stock price down. [FN46] The company claimed it would suffer prejudice because the short-seller's success in the state court action would "moot [plaintiff's] ability to seek redress" in its own action. [FN47] The court found this was sufficient prejudice and allowed the limited discovery requested. [FN48] One court has distinguished between "discovery" and "disclosure" and ordered production of a defendant's insurance policies, holding that it is no burden to simply photocopy an insurance policy and its production will not help bolster the allegations of an otherwise unsustainable complaint. [FN49]

B. Allowing Discovery of Non-Moving Defendants When Some Defendants Move to Dismiss and Some Defendants Answer the Complaint

In a case involving multiple defendants, when some defendants move to dismiss and some defendants answer the complaint, courts are placed in a bind. The defendants who have answered the complaint will participate in discovery; the only question is when. Staying discovery with regard to the answering defendants does nothing but delay the action, running afoul of Rule 1 of the Federal Rules of Civil Procedure, which aims at securing the just, speedy, and inexpensive determination of every action. [FN50] Some discovery, either documents or depositions, is inevitable even for a dismissed defendant if one party has answered, provided it is possible to serve the ***411** dismissed defendant with a subpoena. [FN51] Nevertheless, a moving defendant's interest in this inevitable discovery hinges on the outcome of the motion to dismiss. If the motion is granted, the dismissed defendant will have no interest in the discovery of other defendants or plaintiffs. However, if the motion

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is denied, the defendant will obviously want to cross-examine any deponents.

In Adair v. Kaye Kotts Associates, Inc., [FN52] the decision to permit limited discovery reflected these concerns. [FN53] In Adair, the plaintiff sued an issuer, the signatories to the registration statement, and the issuer's auditor for claims arising from an initial public offering. [FN54] The company and the individual defendants answered, but the auditor moved to dismiss. [FN55] The plaintiff wanted to take discovery, and the auditor objected. [FN56] The judge issued a memo endorsement, allowing document discovery to proceed and requiring the parties to report back to the court before depositions were to begin. [FN57] The memo endorsement stated,

> There are multiple defendants in this action and only one has moved to dismiss. I agree that discovery against that defendant, Feldman Radin, should be stayed. Discovery[,] . . . particularly with respect to documents, should proceed among the other defendants. At the point depositions are to commence, the parties should advise the court in order for the court to determine if the Feldman stay should continue. [FN58]

Thus the plaintiff received documents from the non-moving parties, which would have been produced eventually regardless of the outcome of the motion to dismiss. [FN59] As for depositions, if the motion to dismiss was granted, the moving defendant would have had no reason to participate in the depositions, whereas it would have wanted to protect its interests at the depositions if it remained a party. The auditor won its motion to dismiss before depositions began and the issue of deposition discovery was never decided. [FN60]

***412** In In re Aid Auto Stores, Inc. Securities Litigation, [FN61] a case brought under section 10(b) of the Exchange Act against a company, two individual defendants, and the company's auditor, only the auditor moved to dismiss. [FN62] The non-moving defendants did not argue that the statutory stay applied to them, and, as in Adair, document discovery commenced against those defendants. [FN63] The plaintiffs moved to lift the statutory stay against the auditor, arguing that (1) the auditor would eventually produce the documents either as a defendant or a third-party, (2) the bulk of the documents had already been produced in another litigation arising out of the same facts; and there would be no burden on the auditor to simply make another copy of this prior production, and (3) there would be undue prejudice if the plaintiff in the other litigation were to advance its case to trial first and take the company's limited assets. [FN64] The auditor opposed the motion, arguing that the plaintiffs wanted to obtain information prior to a decision on the motion to dismiss to bolster the allegations in the complaint. [FN65] The court held an oral argument and issued a one-line order denying the motion to lift the stay against the auditor "for the reasons stated on the record at the end of oral argument." [FN66] Magistrate Judge Boyle stated at the close of the oral argument on this issue that the plaintiffs were under a heavy burden to **lift** the **stay**, and "[w]hile I ordinarily would not be inclined to **stay discovery** under these circumstances, I'm obliged to enforce the provisions of the **PSLRA**. . . ." [FN67] The non-moving defendants did not argue the statutory **stay** applied to them, and **discovery** proceeded as to them while **stayed** against the auditor. [FN68]

A district court in Massachusetts decided the issue of whether **discovery** should proceed against defendants who moved to dismiss and had the motion denied when motions to dismiss by other defendants were still ***413** pending. [FN69] In In re Lernout & Hauspie Securities Litigation, [FN70] the court found that allowing **discovery** against those defendants was consistent with the intent of the **stay** provision since such **discovery** would not be a fishing expedition or an attempt to coerce an innocent party into **discovery**. [FN71] The court also reasoned that once the motion to dismiss was denied and the mandates of the **PSLRA** were satisfied, "the general presumption for liberal **discovery** provides the backstop." [FN72] The court allowed document requests and interrogatories upon the parties who lost the motion to dismiss and document subpoenas on non-parties, limited to the claims sustained against the moving parties. [FN73] No depositions were to be taken without leave of the

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court. [FN74]

C. Allowing Discovery Against a Moving Defendant

In Adair and Aid Auto Stores, discovery proceeded against the non-moving defendants but remained stayed as to moving defendants. [FN75] Courts have recently begun allowing discovery even as to the moving defendants. [FN76] The third argument advanced by the plaintiffs in Aid Auto Stores, that there would be undue prejudice because plaintiffs in other litigation would have an advantage, echoed the decision of Global Intellicom [FN77] and recently carried the day in In re Worldcom, Inc. Securities Litigation. [FN78] In Worldcom, there was no decision on a motion to dismiss or an answer, but the judge held that under the “unique circumstances” of the case, where the complaint was “clearly not” a fishing expedition or an attempt to coerce a settlement, production of documents was permitted for documents already produced in other litigations. [FN79] Worldcom had already produced documents to the United States Department of Justice, the Securities and Exchange Commission (SEC), and a law firm representing Worldcom's special investigative committee. [FN80] The United States Attorney for the Southern ***414** District of New York was also conducting a criminal investigation. [FN81] The plaintiffs filed a motion in the bankruptcy court to modify the bankruptcy stay to permit production of documents produced in connection with governmental and internal investigations or produced to the Creditors' Committee, and the motion was granted. [FN82] The issue then was whether the district court would modify the PSLRA stay of discovery. [FN83] The court held there were two purposes behind the PSLRA stay provisions: minimizing incentives to file frivolous actions in the hopes of coercing a settlement through high discovery costs and preventing plaintiffs from finding a sustainable claim not alleged in the complaint. [FN84] The court held that neither concern was implicated and that the plaintiffs would suffer undue prejudice without the discovery:

> Without access to documents already made available [to litigants in other cases or bankruptcy creditors] NYSCRF would be prejudiced by its inability to make informed decisions about its litigation strategy in a rapidly shifting landscape. It would essentially be the only major interested party in the criminal and civil proceedings against Worldcom without access to documents that currently form the core of those proceedings . . . . If [the plaintiffs] must wait until the resolution of a motion to dismiss to obtain discovery and formulate its settlement or litigation strategy, it faces the very real risk that it will be left to pursue its actions against defendants who no longer have anything or at least as much to offer. [FN85]

The second argument advanced in Aid Auto Stores, that the documents had already been produced in another case, carried the day in the Enron litigation. [FN86] The plaintiffs moved for a limited modification of the **automatic stay** in bankruptcy court to obtain documents produced by Enron in response to legislative or executive branch investigations. [FN87] The bankruptcy court agreed to **lift** the **automatic** bankruptcy **stay**, provided the district court would **lift** the **PSLRA stay**. [FN88] The defendants argued that the plaintiffs made no claim that particularized **discovery** was essential to ***415** preserve evidence or prevent prejudice. [FN89] Citing the Cowen case, the defendants argued that the complaint must “stand or fall based on actual knowledge of the plaintiffs rather than information produced by defendants after the action has been filed.” [FN90] In turn, the plaintiffs claimed the document request posed no threat of abusive litigation and the “defendants” therefore should not be allowed to hide behind the statute.” [FN91] The plaintiffs further argued that any burden on the defendants would be slight, since the defendants had previously located, reviewed, and organized the documents. [FN92] The district court held that while the PSLRA discovery stay was to protect defendants from unnecessary discovery costs, “[i]n a sense this discovery has already been made, and it is merely a question of keeping it from a party because of the strictures of a statute designed to prevent discovery abuse,” and ordered production of the documents.” [FN93]

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***416** The Worldcom and Enron holdings were followed in a somewhat limited fashion by In re Williams Securities Litigation. [FN94] In Williams, the defendant had been subject to several governmental investigations and produced documents in response to these investigations. [FN95] The plaintiffs in the civil securities fraud action sought a partial lift of the stay, arguing it was necessary to preserve the evidence and avoid undue prejudice. [FN96] The court held that since the defendants kept copies of the documents it produced to the government, there was no risk of loss of relevant evidence. [FN97] However, the court held that since the documents had already been organized and copied, it would impose no hardship on defendants to produce them to plaintiffs, and since the plaintiffs represented that the information in the documents would not be used to defeat the motion to dismiss, which was already fully briefed, or to amend the complaint, enforcing the stay "would not serve any interest the PSLRA was enacted to advance." [FN98] This represents a slight modification of the Worldcom, AOL, and Enron holdings in that the documents would only be used to evaluate the case for settlement purposes and not to amend the complaint. [FN99]

IV. REFUSING TO LIFT THE STATUTORY STAY AT ALL

In In re CFS-Related Securities Fraud Litigation, [FN100] one defendant answered the complaint prior to the other defendants motions to dismiss. [FN101] The answering defendant and plaintiff served document requests on each other and served responses to the requests without producing any documents. [FN102] The individual defendants then moved to dismiss, and the answering defendant moved to dismiss cross-claims pled against it. [FN103] The answering defendant then refused to produce documents responsive to the plaintiff's document requests despite its earlier agreement to do so, citing ***417** the discovery stay triggered by the motion to dismiss. [FN104] In CFS I, the issue was whether plaintiffs would be permitted document discovery from the non-moving defendants. [FN105] When plaintiffs moved to compel, the court held that "[a]s long as any defendant has filed a motion to dismiss claims arising under Chapter 2B of the 1934 Securities Act, the PSLRA stays 'all discovery,' even discovery against answering, non-moving defendants." [FN106] The court's rationale was that if the stay were not granted, "the PSLRA's stay would be of little benefit to those defendants who do move to dismiss." [FN107] The court reasoned that a moving defendant will, at a minimum, want to "monitor" discovery between plaintiffs and the other parties to protect its own interests. [FN108] In addition, the court said it would be inefficient to have the non-moving defendants respond to document requests twice, which it would have to do if the moving defendant lost its motion and then served document requests on its co-defendant. [FN109]

The court in CFS I eventually denied the defendants' motions to dismiss. [FN110] The defendants then filed cross-claims and counterclaims against each other, and moved to dismiss each other's claims. [FN111] Some defendants also filed third-party complaints against various ratings agencies and other entities, and the third-party defendants also moved to dismiss. [FN112] The court then had to determine whether the PSLRA discovery stay operated against defendants who moved to dismiss cross-claims by other defendants or the third-party defendants. [FN113] With regard to defendants against whom the plaintiffs' claims had been upheld, the court refused to stay discovery. [FN114] The court held that the discovery stay was intended to prevent a defendant from incurring needless discovery costs until a court determined that a plaintiff pled a prima facie case. [FN115] The court reasoned that with regard to defendants in the main case, that determination had been made, and all defendants would remain parties to the suit regardless of the determinations regarding the cross-claims. [FN116] With regard to the third-party ***418** defendants, the court stayed discovery, holding that there had been no determination of the adequacy of the complaints against them and that there should be no discovery prior to a determination that a complaint had been properly plead. [FN117]

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In CFS II, the court took pains to state it "is not distancing itself from its prior ruling." [FN118] However, it is hard to reconcile the two opinions. In CFS II, the court relied in part on the Lernout case, which allowed discovery against defendants against whom the complaint was upheld while motions to dismiss by other defendants were still pending. [FN119] In allowing discovery to proceed in CFS II while motions to dismiss were pending, the court looked beyond the language of the statute to its intent, which it did not do in CFS I. [FN120] If the same reasoning had been used in CFS I as was used in CFS II, the court would likely have allowed discovery against the parties who answered the complaint, because, using the reasoning in CFS II, "regardless of the court's decision with regard to those remaining motions to dismiss, [these defendants] will remain as parties to this lawsuit." [FN121]

V. LIFTING THE STAY IS APPROPRIATE IN SOME INSTANCES

The stay during a motion to dismiss is an exception to the general rule that discovery should commence as soon as possible and therefore should be narrowly construed. [FN122] Many courts have stated that by passing the discovery stay provisions of the PSLRA, Congress was stating that there should be no discovery until the court rules on the sufficiency of the complaint. [FN123] When a party answers a complaint, it is admitting the sufficiency of the complaint, and the reasons supporting the stay do not apply to that party. Discovery of an answering defendant, whether through document production, depositions, or interrogatories, is inevitable, and the cost will be incurred eventually. There is no reason to stay document discovery against an answering party, as the Adair court recognized. [FN124] However, depositions involve non-moving parties as well, and a credible argument can be made that moving parties should not be forced to bear the costs of preparing for depositions of answering parties. If the moving party wins its ***419** motion, time spent preparing for and attending depositions of answering parties will have been wasted. However, an equally credible argument can be made that depositions should be allowed of the moving party. Since one party has answered, discovery and depositions are inevitable. Even if the moving party prevails on its motion to dismiss, it can be deposed pursuant to a subpoena. Thus, the moving party will not incur unnecessary costs preparing for its own depositions, since it will inevitably incur those expenses anyway.

When a defendant answers a complaint or loses a motion to dismiss, the general purpose of the PSLRA is satisfied in that a defendant or a court has decided the claims are at least facially meritorious and should proceed towards trial. [FN125] The balancing between the general purposes of the federal securities laws, which are essential to public confidence in the securities markets, and the narrow purpose of the stay provisions of the PSLRA is best accomplished by allowing discovery against non-moving defendants. This allows faster resolution of cases, which brings closure for defendants, investors who lost their money, and the investing public which needs confidence that transgressions of the securities laws are dealt with quickly and justly. The federal securities laws were passed in the 1930s to help restore investor confidence in the public securities markets after the stock market crash of 1929. [FN126] If the securities laws are viewed by the public as a source of interminable delays to recovery, especially with regard to defendants who have admitted the sufficiency of the allegations against them, investor confidence in the securities markets will be undermined. With the need for strong securities laws and effective remedies now more evident than ever after the debacles of Enron, Worldcom, and others, the wisdom of the **PSLRA** is in doubt and some in Congress are calling for its wholesale repeal. [FN127] The **PSLRA** should be afforded the narrowest construction possible, and the civil litigation contemplated by the federal securities laws should be allowed to proceed so that these cases have the quickest possible resolution.

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VI. CONCLUSION

Many courts have **lifted** the **PSLRA's discovery stay** for a variety of reasons. [FN128] The situation where one party answers the complaint, making ***420 discovery** inevitable, moots most of the concerns which motivated Congress to include the **discovery stay** in the **PSLRA**. [FN129] In these circumstances, it is appropriate to **lift** the **stay** with regard to document **discovery**. [FN130] This helps insure the speedy disposition of the case and imposes no unnecessary burden on the moving defendants. By limiting the **discovery** to documents, the moving defendant is protected from the potentially unnecessary cost of depositions of the answering parties. Finally, there is no danger of a plaintiff "discovering" his or her way into a sustainable complaint since the answering defendant has admitted by answering that there is no basis to challenge the legal sufficiency of the complaint. [FN131]

[FNa1]. Mr. Murray, J.D., cum laude, St. John's University School of Law; M.A., B.A., University of Notre Dame, is a member of Murray, Frank & Sailer, LLP.

[FN1]. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. §§ 77et.seq., 78et. seq. (2000)).

[FN2]. 15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B) (2000).

[FN3]. See id.

[FN4]. See infra Part III.

[FN5]. 15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B).

[FN6]. Id.

[FN7]. Medhekar v. United States Dist. Court, 99 F.3d 325, 328 (9th Cir. 1996); Lapicola v. Alternative Dual Fuels, Fed. Sec. L. Rep. (CCH) P 91,765 (N.D. Tex. Apr. 5, 2002); 141 Cong. Rec. H14039-02(1995) (statement of Rep. Bliley).

[FN8]. H.R. Conf. Rep. No. 104-369, at 32 (1995), reprinted in 1995 U.S.C.C.A.N. 731, 732.

[FN9]. Id.

[FN10]. Fed. R. Civ. P. 26(c).

[FN11]. Id.

[FN12]. Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990).

[FN13]. Id.

[FN14]. Id. ("Such general arguments could be said to apply to any reasonably large civil litigation.").

[FN15]. See Fed. R. Civ. P. 26(c)(1) (stating that the court may order that discovery not be had "for good cause shown").

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[FN16]. E.g., Twin City Fire. Ins. Co. v. Employers Ins. of Wasau, 124 F.R.D. 652, 653 (D. Nev. 1989).

[FN17]. See Kron Med. Corp. v. Groth, 119 F.R.D. 636, 637-38 (M.D.N.C. 1988) (considering impacts of cost to counsel who must reacquaint themselves with a case and the concern that evidence may be lost).

[FN18]. Twin City Fire Ins., 124 F.R.D. at 653.

[FN19]. Moran v. Flaherty, No. 92 CIV. 3200 (PKL), 1992 WL 276913, at *2 (S.D.N.Y. Sept. 25, 1992); In re Chase Manhattan Corp. Sec. Litig., No. 90 Civ. 6092 (LMM), 1991 WL 79432, at *1 (S.D.N.Y. May 7, 1991); Bio Feedtrac, Inc. v. Koliner Optical Enters. & Consultants, No. CV 90-1169 (EHN), 1991 WL 85951, at *1 (E.D.N.Y. May 7, 1991); Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990); Shields v. Silk Greenhouse, Inc., No. 89-1612-Civ.-T-15A, at 1-2 (M.D. Fla. Sept. 4, 1990); Moss v. Hollis, 1990 Fed. Sec. L. Rep. (CCH) P 95,443, 97,260 (D. Conn. June 29, 1990); Shields v. NCNB Corp., Nos. C-C-90-0090-MU & C-C-90-0099-MU, 1991 WL 146854, at *1-*2 (W.D.N.C. June 20, 1990); Twin City Fire Ins., 124 F.R.D. at 653; Simpson v. Spec. Retail Concepts, 121 F.R.D. 261, 263 (M.D.N.C. 1988); Howard v. Galesi, 107 F.R.D. 348, 350-51 (S.D.N.Y. 1985).

[FN20]. Med. Imaging Ctrs. of Am. v. Lichtenstein, 917 F. Supp. 717, 720-21 (S.D. Cal. 1996); Novak v. Kasaks, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 99,307, 95,861-62 (S.D.N.Y. Aug. 16, 1996).

[FN21]. S. Rep. No. 104-98, at 14 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 693.

[FN22]. Vacold, LLC v. Cerami, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 91,334, 95,505 (S.D.N.Y. Feb. 16, 2001) (quoting Med. Imaging Ctrs. of Am., 917 F. Supp. at 720). One court held that it was not undue prejudice when an eighty-year-old plaintiff lost her life savings and the case might not proceed without discovery. Sarantakis v. Grattadauria, No. 02 C 1609, 2002 WL 1803750, at *3 (N.D. Ill. Aug. 5, 2002).

[FN23]. Faulkner v. Verizon Comm., Inc., 156 F. Supp. 2d 384, 406 (S.D.N.Y. 2001). "Simple delay" does not qualify as undue prejudice. In re Initial Public Offering Sec. Litig., 236 F. Supp. 2d 286, 287 (S.D.N.Y. May 20, 2002).

[FN24]. Vacold, Fed. Sec. L. Rep. at 95,505.

[FN25]. SG Cowen Sec. Corp. v. United States Dist. Court, 189 F.3d 909, 913 (9th Cir. 1999).

[FN26]. Most courts are in agreement that a defendant's announced intention to file a motion to dismiss is enough to invoke the statutory stay. In re DPL Inc., Sec. Litig., 247 F. Supp. 2d 946, 947 n.4 (S.D. Ohio 2003); In re JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127, 1133 (N.D. Cal. 2002); In re Carnegie Int'l Corp. Sec. Litig, 107 F. Supp. 2d 676, 682-83 (D. Md. 2000); In re Trump Hotel S'holder Derivative Litig., [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 99,537, 97,653 (S.D.N.Y. Aug. 5, 1997). But see Dartley v. Ergobilt, 1998 WL 792500, at *2 (N.D. Tex. Nov. 4, 1998) (holding that the stay is only mandatory if motion to dismiss is already filed); Novak v. Kasaks, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. P 99,307, 95,861 (S.D.N.Y. Aug. 16, 1996) (stating it denied earlier request to stay discovery because motion to dismiss was not yet filed).

[FN27]. E.g., In re Flir Systems, Inc. Sec. Litig., Fed. Sec. L. Rep. (CCH) P 91,308, 95,746 (D. Or. Dec. 13, 2000).

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[FN28]. Fed. Sec. L. Rep. (CCH) P 91,308.

[FN29]. In re Flir Systems, Fed. Sec. L. Rep. at 95,746.

[FN30]. Id.

[FN31]. Id.

[FN32]. Id. (citation omitted); see also In re JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127, 1136-37 (N.D. Cal. 2002) (amending confidentiality order to allow willing third party witnesses to speak to plaintiffs' investigators).

[FN33]. 157 F. Supp. 2d 1230 (D. Utah. 2001).

[FN34]. Anderson, 157 F. Supp. 2d at 1241-42.

[FN35]. Id. at 1242.

[FN36]. Id.

[FN37]. Id.

[FN38]. Id.

[FN39]. Id.

[FN40]. No. Civ.A.3:98-CV-1442-G, 999 WL 792500 (N.D. Tex Nov. 4, 1998).

[FN41]. Dartley, 999 WL 792500, at *2.

[FN42]. Id.

[FN43]. E.g., Global Intellicom, Inc. v. Thomas Kernaghan & Co., No. 99 CIV 342(DLC), 1999 WL 223158, at *1 (S.D.N.Y. Apr. 16, 1999).

[FN44]. No. 99 CIV 342(DLC), 1999 WL 223158 (S.D.N.Y. Apr. 16, 1999).

[FN45]. Global Intellicom, Inc., 1999 WL 223158, at *1.

[FN46]. Id.

[FN47]. See id.; see also In re Pac. Gateway Exch., Inc. Sec. Litig., No. C 00-1211 PJH (JL), 2001 U.S. Dist. LEXIS 18433, at *3 (N.D. Cal. Oct. 17, 2001) (allowing limited discovery of bankrupt defendants to prevent evidence from being lost); Tobias Holdings, Inc. v. Bank United Corp., 177 F. Supp. 2d 162, 168-69 (S.D.N.Y. 2001) (allowing discovery for state law claims while staying discovery on federal claims when basis of jurisdiction for state claims was diversity). But see Angell Investments, L.L.C. v. Purizer Corp., No. 01 C 6359, 2001 U.S. Dist. LEXIS 17782, at *5-*7 (N.D. Ill. Oct. 31, 2001) (refusing to allow discovery on related state law claims even if there was an independent basis for jurisdiction).

[FN48]. Global Intellicom, Inc., 1999 WL 223158, at *2.

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[FN49]. In re Comdisco Sec. Litig. 166 F. Supp. 2d 1260, 1262-63 (N.D. Ill. 2001). But see Medhekar v. United States Dist. Court, 99 F.3d 325, 328 (9th Cir. 1996) (refusing to distinguish between discovery and initial disclosures and holding initial disclosures were covered under statutory stay).

[FN50]. Fed. R. Civ. P. 1.

[FN51]. Fed. R. Civ. P. 45(a)(1)(C).

[FN52]. No. 97 CIV. 3375(SS), 1998 WL 142353 (S.D.N.Y. Mar. 24, 1998).

[FN53]. Adair, No. 97 CIV. 3375(SS), 1998 WL 142353, memorandum endorsement, Sept. 24, 1997 (on file with author).

[FN54]. Adair, No. 97 CIV. 3375(SS), 1998 WL 142353, at *1.

[FN55]. Id.

[FN56]. See Adair, No. 97 CIV. 3375(SS), 1998 WL 142353, memorandum endorsement, Sept. 24, 1997 (on file with author).

[FN57]. Id.

[FN58]. Id.

[FN59]. See id.

[FN60]. Adair, No. 97 CIV. 3375(SS), 1998 WL 142353, at *1.

[FN61]. No. CV-98-7395 (DHR) (E.D.N.Y. Feb. 15, 2000).

[FN62]. Plaintiffs' Memorandum of Law in Support of Their Motion to Lift the Stay of Discovery at 1-2, In re Aid Auto Stores, Inc. Sec. Litig. (E.D.N.Y. July 7, 2000) (No. CV 98-7395 (DRH)).

[FN63]. Id. at 4.

[FN64]. Plaintiffs' Memorandum of Law in Further Support of Their Motion to Lift the Stay of Discovery at 2-4, In re Aid Auto Stores, Inc. Sec. Litig. (E.D.N.Y. 2000) (No. CV 98-7395 (DRH)).

[FN65]. Transcript of Civil Cause for Motion Before the Honorable E. Thomas Boyle United States Magistrate Judge at 10, In re Aid Auto Stores, Inc. Sec. Litig. (E.D.N.Y. Oct. 2, 2000) (No. CV 98-7395 (DRH)) [hereinafter Transcript of Oral Argument].

[FN66]. Civil Conference Order, In re Aid Auto Stores, Inc. Sec. Litig. (E.D.N.Y. Oct. 2, 2000) (No. CV 98-7395 (DRH)).

[FN67]. Transcript of Oral Argument at 15, In re Aid Auto Stores, Inc. Sec. Litig. (E.D.N.Y. Oct. 2, 2000) (No. CV 98-7395 (DRH)).

[FN68]. Civil Conference Order, In re Aid Auto Stores, Inc. Sec. Litig. (E.D.N.Y. Oct. 2, 2000) (No. CV 98-7395 (DRH)).

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[FN69]. In re Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100, 106-07 (D. Mass 2002).

[FN70]. 214 F. Supp. 2d 100 (D. Mass 2002).

[FN71]. Lernout & Hauspie, 214 F. Supp. 2d at 106-07.

[FN72]. Id. at 107.

[FN73]. Id. at 109.

[FN74]. Id.

[FN75]. See supra Part III.

[FN76]. In re Worldcom, Inc. Sec. Litig., 234 F. Supp. 2d 301, 305-06 (S.D.N.Y. 2002).

[FN77]. Global Intelligence, Inc. v. Thomas Kernaghan & Co., No. 99 CIV 342, 1999 WL 223158, at *2 (S.D.N.Y. Apr. 16, 1999).

[FN78]. Worldcom, Inc., 234 F. Supp. 2d at 305-06 (S.D.N.Y. 2002).

[FN79]. Id. at 305.

[FN80]. Id.

[FN81]. Id. at 302.

[FN82]. Id. at 304.

[FN83]. Id.

[FN84]. Id. at 305.

[FN85]. Id. at 305-06.

[FN86]. In re Enron Corp. Sec. Deriv. & "ERISA" Litig., Nos. MDL-1446, Civ.A. H-01-3624, 2002 WL 31845114, at *2 (S.D. Tex. Aug. 16, 2002).

[FN87]. Id. at *1.

[FN88]. Id.

[FN89]. Id.

[FN90]. Id. (citing SG Cowan Securities Corp. v. United States Dist. Court, 189 F.3d 909, 912 (9th Cir. 1999)). In somewhat different circumstances, a similar argument was rejected on a request for leave to amend. In In re Hayes Lemmerz International, Inc. Equity Securities Litigation the court upheld a fraud complaint against certain defendants but granted the motion as to the auditor. In re Hayes Lemmerz Int'l, Inc. Equity Sec. Litig. 271 F. Supp. 1007, 1018-21 (E.D. Mich. 2003). The court granted leave to amend with regard to the auditor after discovery, holding "there is no fear that this is merely a baseless strike suit. Instead, because the plaintiffs have had

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no discovery, they simply do not have the specifics to determine what KPMG knew and what they should have known." Id. at 1020 n.9. Thus, the court was unconcerned that an amended complaint might incorporate the fruits of discovery because the case was already found to be meritorious against the other defendants and was not a fishing expedition. Id.

[FN91]. In re Enron Corp., 2002 WL 31845114, at *2.

[FN92]. Id.; see also In re AOL Time Warner, Inc. Sec. & ERISA Litig., [2002-2003 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 92,291, 91,809 (S.D.N.Y. Feb. 28, 2003) (allowing production of documents during pendency of motion to dismiss when documents had already been produced to government agencies and the plaintiffs were not engaged in a fishing expedition); Tobias Holdings, Inc. v. Bank United Corp., 177 F. Supp. 2d 162, 166, 168 (S.D.N.Y. 2001) (allowing discovery of state claims pled in same complaint as federal claims and finding requested discovery was not a fishing expedition and case was not frivolous). But see Rampersad v. Deutsche Bank Secs., No. 02 Civ.7311(LTS)(AJP), 2003 WL 21074094, at *2 (S.D.N.Y. May 9, 2003) (finding no "categorical exception" to discovery stay because of a governmental investigation). The AOL decision was later vacated pending reconsideration after the amended complaint was filed. In re AOL Time Warner, Inc. Sec. & ERISA Litig., No. 02-MDL-1500, 2003 WL 21229703, at *1 (S.D.N.Y. Apr. 3, 2003). After the amended complaint was filed, the court refused to lift the stay to allow for production of documents produced to governmental agencies, holding there was no concern defendants would not preserve evidence and there would be no undue prejudice. In re AOL Time Warner, Inc. Sec. & ERISA Litig., No. 1500, 02 Civ. 5575(SWK), 2003 WL 21729842, at *1-*2 (S.D.N.Y. July 25, 2003).

[FN93]. In re Enron Corp., 2002 WL 31845114, at *2. However, in Faulkner v. Verizon Comm., Inc. the court refused to allow production of documents which had been produced in another case. Faulkner v. Verizon Comm., Inc., 156 F. Supp. 2d 384, 405 (S.D.N.Y. 2001). In Verizon, the plaintiffs subpoenaed documents from a party to another litigation that had been produced by the defendant in their case. Id. at 401. The plaintiffs argued it was no burden to defendants since the documents had already been produced. Id. at 405. The court refused to lift the stay to allow production of the documents but did note that defendants should not use the "stay as a shield to insulate themselves from liability." Id.

[FN94]. In re Williams Sec. Litig., No. 02-CV-72H(M), 2003 WL 22013464, at *4 (N.D. Okla. May 21, 2003).

[FN95]. Id. at *2.

[FN96]. Id. at *3.

[FN97]. Id.

[FN98]. Id. But see In re Vivendi Universal, S.A., Sec. Litig., No. 02 Civ. 5571(HB), 2003 WL 21035383, at *1 (S.D.N.Y. May 6, 2003) (refusing to lift stay despite plaintiff's assurances that information would not be used in complaint); In re Lantronix, Inc. Sec. Litig., No. CV 02-03899 PA, 2003 WL 22462393, at *1-*2 (C.D. Cal. Sept. 26, 2003) (refusing to lift stay to allow production of documents produced to government, despite defendant's admission that part of the complaint sufficiently plead fraud, because there was no showing the documents were necessary for settlement discussions and no risk they would be lost).

[FN99]. See In re Williams, 2003 WL 22013464, at *3.

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[FN100]. 179 F. Supp. 2d 1260 (N.D. Okla. 2001) (hereinafter CFS I).

[FN101]. CFS I, 179 F. Supp. 2d at 1262.

[FN102]. Id.

[FN103]. Id.

[FN104]. Id.

[FN105]. Id. at 1264.

[FN106]. Id. at 1263.

[FN107]. Id.

[FN108]. Id.

[FN109]. Id. at 1263-64.

[FN110]. Id. at 1262.

[FN111]. In re CFS-Related Sec. Fraud Litig., 213 F.R.D. 435, 436-37 (N.D. Okla. 2003) (hereinafter CFS II).

[FN112]. Id.

[FN113]. Id. at 442-44.

[FN114]. Id. at 446.

[FN115]. Id.

[FN116]. Id.

[FN117]. Id. at 447.

[FN118]. Id. at 446.

[FN119]. Id. at 445 (citing generally Lernout & Hauspie Sec. Litig., 214 F. Supp. 2d 100 (D. Mass 2002)); see also supra Part III.C.

[FN120]. In re CFS-Related Sec. Fraud Litig., 213 F.R.D. 435, 446 (N.D. Okla. 2003).

[FN121]. Id.

[FN122]. CIR v. Clark, 489 U.S. 726, 739 (1989).

[FN123]. In re CFS-Related Sec. Fraud Litig., 179 F. Supp. 2d 1260, 1264 (N.D. Okla. 2001).

[FN124]. See supra Part III.B.

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[FN125]. H.R. Conf. Rep. No. 104-369 at 32 (1995), reprinted in 1995 U.S.C.C.A.N. 731, 732.

[FN126]. 77 Cong. Rec. 937 (1933).

[FN127]. Representative Bart Stupak of Michigan sponsored a repeal bill in February 2002, The Shareholders and Employee Rights Restoration Act of 2002, H.R. 3829, 107th Cong. (2002).

[FN128]. See supra Part III.

[FN129]. See id.

[FN130]. See id.

[FN131]. See id.

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